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Issue Date: 23 January 2004

Case No. 1995 BLA 01623

VIVIAN STONE, on behalf of
EUGENE STONE, (deceased)
Claimant,

v.

ZEIGLER COAL COMPANY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party In-Interest.

BEFORE: MOLLIE W. NEAL
Administrative Law Judge

DECISION AND ORDER ON RECONSIDERATION –AWARDING BENEFITS

This matter is before the undersigned on Claimant's Motion for reconsideration of my Decision and Order granting modification in the above captioned case.

In my decision awarding benefits, I granted the Claimant's petition for modification of the decision of the prior administrative law judge, based on a finding that Claimant had shown a change in condition since the initial denial of the miner's claim. The miner was found to have established the presence of pneumoconiosis and a disabling respiratory impairment since the date of the prior denial of his claim. Benefits were awarded retroactively to January 1993. I also found that the subsequent claims filed in 1987 and 1990 merged with Mr. Stone's 1980 claim, since his request for formal hearing , following the district director's denial of his request for modification of the 1985 denial of his claim, had not been acted upon. *Brunozzi v. Director, OWCP*, BRB No. 1037 BLA (September 28, 1992) (unpublished).

Claimant filed a timely request for reconsideration, asserting that my decision was based on an erroneous interpretation of the mistake in fact ground for modification, and as a result the date of onset of the miner's disability was incorrectly determined. Claimant requested that I reevaluate my decision, and that total disability benefits be awarded for an onset date of

September 9, 1980, the date of the filing of the initial claim.

Thereafter, Employer filed a petition for modification with the District Director, under the mistaken belief that the July 31, 1996 award of benefits had become final. In its petition, Employer asserted that the prior award was based on mistake in fact. In support of its modification request, Employer submitted a medical report prepared by Dr. Richard Naeye, dated June 8, 1997, in which the physician reviewed the autopsy slides and medical records and rendered his evaluation of the miner's pulmonary condition. Employer also submitted the report of Dr. Peter Tuteur, dated June 24, 1997. Dr. Tuteur's report was also based on a review of the medical records and the pathology reports.

When notified by OWCP that the decision awarding benefits was not final and that the matter was pending before the administrative law judge on Claimant's motion for reconsideration, Employer submitted a motion for reconsideration , on January 30, 1998. In support of the request, Employer proffered the medical reports of Drs. Naeye and Tuteur,[1] and requested that the matter be remanded to the district director for consideration of additional medical evidence.

On the merits of the claim, Employer asserted that my decision was based on a mistake in fact in my reading of Dr. Katubig's autopsy report. Employer also submitted additional medical evidence - the medical reports of Drs. Peter Tuteur and Richard Naeye. Both physicians are pathologist, who reviewed the pathology reports and the medical records and evaluated the miner's pulmonary condition. Dr. Tuteur's report is dated June 24, 1997 and Dr. Naeye's report is dated June 8, 1997. Neither report takes into consideration any new evidence which was not a part of the record, on June 1, 1996, the date specified for submission of evidence in my April 5, 1996 Order granting claimant's request for a decision on the record. [2]

Claimant disagreed with Employer's reading of my evaluation of Dr. Katubig's autopsy report. However, she argued that Dr. Katubig's report is internally inconsistent and should be reviewed on reconsideration to determine whether it is a well reasoned medical opinion.[3]

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[1] The physicians' medical reports are marked for identification as Employer's Exhibit 5 (report of Dr. Naeye) and Employer's Exhibit 6 (report of Dr. Tuteur).

[2] Employer also seeks to supplement the record with the following B-reader reports of the August 30, 1994 chest x-ray which are marked seriatim as EX 7-10: (1) x-ray reading dated March 2, 2002 by Dr. Jerome WIOT; (2) x-ray report dated May 27, 2002 by Dr. Harold Spitz (3) x-ray report o Dr. Charles Perme, dated August 13, 2002; and (4) x-ray report of Dr. Ralph Shipley, dated August 22, 2002.

Evidence of the August 30, 1994 chest x-ray was introduced by Employer as EX 3 on October 15, 1995, and identified as supporting documentation for Dr. Jeff Selby's pulmonary evaluation of the miner (EX 3). Dr. Selby read the x-ray as showing small opacities consistent with pneumoconiosis.

[3] Some time after the award of benefits on July 31, 1996, and the filing of the respective Motions for Reconsideration of the parties, this Office's file was misplaced. After Claimant's status inquiry in September of 2002, it was discovered that a ruling had not been issued on the motions. Employer and Claimant have resubmitted their motions, and responsive pleadings and accompanying documents. This decision is based on a reconstructed record provided by the Office of Workers' Compensation Programs and the parties

DISCUSSION

I. Employer's Motion to Supplement the Record

Employer now seeks to supplement the record.[4] In support of its motion, Employer stated that its previous attorney, Wayne Reynolds, had voluntarily surrendered his license to practice law and was then under investigation by the Illinois Attorney Registration and Disciplinary Commission for neglect of client affairs, and character related issues. Employer stated further that Mr. Reynolds had neglected its interest in this black lung claim and that it had retained new counsel. Claimant also objected to Employer's offer of new evidence, noting that the proposed additional evidence is cumulative in nature, the record is closed, and that nothing in this record supports a conclusion that Employer's former counsel was negligent in his duty of representation during the adjudication of this claim

Employer's arguments do not present compelling reasons for reopening this record. Since the miner died prior to the hearing, there is no new medical evidence relating to change in condition. Claimant is correct that the evidence proffered by Employer is cumulative in nature. To the extent that it may cure any evidentiary gaps in Employer's case, the time for submission of such evidence has passed. To reopen the record at this stage would be unduly burdensome for the Claimant. Employer was given ample opportunity to rebut Claimant's evidence.While Mr. Reynolds' decision to rest on the evidence presented in its case in chief, and not to submit rebuttal to Dr. Miles' opinion or re-readings of the August 30, 1994 chest film, may not have been the litigation decision subsequently retained counsel would have made, nothing in this record suggests that there exist circumstances which would militate against holding Employer bound by the litigation decisions of its counsel. Moreover, even if Employer's counsel was negligent in his duty of representation, the general rule that a party is bound by the actions of its attorney, no matter how negligent or incompetent, would apply. *See Link v. Wabash Railroad Co.*, 370 U.S. 630 (1962); *Helm v. Resolution Trust Corp*., 84 F.3d 874 (7th Cir. 1996); *Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58, 2-63 (4th Cir. 1986); *Howell v. Director, OWCP*, 7 BLR 1-259 (1984). For the foregoing reasons, Employer's request to remand and to supplement the record is denied. Employer's exhibits 5- 10, which were proffered on January 30, 1998 and October 1, 2002, are excluded from the record.

II. Modification

Claimant correctly notes that this case does not involve a change in condition under Section 725.309 of the regulations. The pending action is before me on Claimant's appeal from the district director's denial of the miner's modification petition, filed in 1986. The miner's

[4] Mr. Stone died prior to the formal hearing, and Claimant requested that the matter be decided on the record. Employer did not object and the request was granted. A schedule for the submission of additional evidence and briefs was established by order of April 5, 1996. The record closed on June 1, 1996 and my decision was issued on July 31, 1996.

initial claim for black lung benefits was filed on September 9, 1980, and was denied by Judge Leonard Lawrence on January 29, 1985 based on a finding that the evidence failed to establish pneumoconiosis (DX-22). A timely modification request was filed; and following the district director's denial on January 23, 1986, the miner requested a hearing on January 27, 1986. That request for hearing was not acted upon by the district director.

Thereafter, the miner filed two additional claims on January 13, 1987 and August 6, 1990. Because the 1987 claim was pending when the 1990 claim was filed, the two claims merged, and were denied by the district director under the modification procedures on September 28, 1990. (DX 11) The miner again requested formal hearing and the case was heard by Judge Glenn Lawrence, who denied modification on January 15, 1993, finding he had failed to establish a material change in condition since the previous denial. (DX 36) Judge Lawrence ruled that, because the Department of Labor did not respond to the 1986 request for formal hearing, the miner's 1986 petition for modification was still pending and the subsequently filed 1987 and 1990 claims merged with that petition. (DX 36) *See Brunozzi v. Director*, *OWCP,* BRB No 87-1037 BLA (September 28, 1992) (unpublished). Judge Lawrence, thereafter, set aside his decision and remanded the matter to the district director (DX 38). After the district director's denial, the claim was again returned to this Office for formal hearing. Claimant again filed a timely request for modification, and Judge Michael O'Neill remanded to the district director. The matter was subsequently returned to this Office, and I issued a decision granting modification and awarding benefits on July 31, 1996. (DX 44, DX 52). The pending motion for reconsideration was timely filed thereafter.

Judge Leonard Lawrence's Prior Denial

The evidence before Judge Leonard Lawrence at the time the claim was denied on January 29, 1985, and the Judge's findings based on that evidence are as follows.

Judge Lawrence considered the following x-ray reports:

Exhibit No.	X-Ray Date	Physician/Qualifications	Interpretation
CX 2	10/06/79	Ravindranathan	Multiple granulomas
CX 1	9/24/81	Brandon	1/1 p
DX 8	9/24/81	Brown, BCR	0/0
DX 9	9/24/81	Sargent R/BCR	0/0
CX 4	10/01/82	Edelman, B/BCR	0/0, calcified granuloma
EX 2	10/01/82	Renn, B/BCR	0/0, old granulomatous disease
EX 5	10/01/82	Bridges, B/BCR	0/0, calcified granuloma
CX 3	8/09/84	Minetree	2/1
CX 5	8/09/84	Brandon, B/BCR	1/1/ p
EX 13	8/09/84	Renn, B/BCR	0/0 bilateral calcification consistent with old granulomatous disease
EX 12	8/09/84	Morgan , B/BCR	0/0

Judge Lawrence accorded the greatest weight to the opinions of the board-certified radiologists and B-readers, in reaching his finding under 20 C.F.R. §718.202(a)(1) that Dr. Brandon's positive readings were outweighed by the opinions of Drs. Bridges, Edelman, Sargent, Renn, and Morgan. Judge Lawrence, thus, found the x-ray evidence insufficient to establish pneumoconiosis.[5]

The administrative law judge found the presumptions at 20 C.F.R. 718.304, and 718.306 to be inapplicable, but that the Section 718.305 presumption did apply to this claim. Section 718.305 provides that if a miner was employed for more than 15 years in underground coal mines, and if there is negative chest x-ray, but other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that such miner is totally disabled due to pneumoconiosis. In considering whether a totally disabling respiratory or pulmonary impairment existed, Judge Lawrence analyzed the evidence under Section 718.204.

Judge Lawrence considered two pulmonary functions studies: (1) a study taken on August 7, 1984; and (2) a study taken on September 24 1981. The more recent pulmonary function study was reviewed by Drs. Renn, Vest and Anderson. All three physicians found that the tracings indicated the miner did not maintain maximal effort on the FVC portion of the test, that the results of the FEV_1 test were not within 5% of each other, and Dr. Vest noted coughing on the MVV portion of the test. Based on these technical deficiencies in the test, Judge Lawrence found it did not meet the quality standards set forth in the regulations, and accorded it little weight. The September 24, 1981 pulmonary function study did not yield values which qualified under the disability criteria found at Appendix B of the Part 718 regulations. Judge Lawrence found this test did not demonstrate that the miner had a totally disabling respiratory or pulmonary impairment.

The results of the one blood gas study dated September 24, 1981 did not meet the disability criteria set forth in Appendix C, Part 718 regulations. (See DX 7)

Judge Lawrence considered the medical reports and concluded that the physician opinions did not establish that the miner had a respiratory or pulmonary condition which prevented him from engaging in his usual coal mine employment. Dr. Parviz Sanjabi's opinion was found to be insufficient to establish total disability under 20 C.F.R. 718.204(c) (4), inasmuch as the doctor did not indicate that the miner was unable to engage in his usual or comparable gainful employment because of his respiratory or pulmonary condition. Dr. Ravindranathan (a/k/a Dr. Ravin) found the miner to be totally disabled. Although he was not sure the miner was disabled due to coal workers pneumoconiosis, he nonetheless concluded total disability was due in part to coal workers' pneumoconiosis and in part to aortic stenosis. Judge Lawrence did not credit Dr. Ravin's disability opinion, stating that "[h]e never clearly stated claimant was totally disabled due to pneumoconiosis. His deposition testimony indicated that, while he felt claimant

[5] By letter dated January 11, 1985, Counsel for Employer submitted the x-ray reading of Dr. Dorsett Smith, a B-reader, of an x-ray dated August 9, 1984. The reading was negative for the presence of pneumoconiosis. This x-ray reading was not considered by Judge Lawrence in his January 29, 1985 decision. Had the negative x-ray report been considered by Judge Lawrence it would not have affected the outcome of his decision, since he found the x-ray evidence to be insufficient to establish pneumoconiosis.

had radiographic evidence of pneumoconiosis, the pulmonary function studies did not demonstrate a significant respiratory or pulmonary impairment." Judge Lawrence, thus, found the miner was not entitled to invoke the rebuttable presumption of pneumoconiosis pursuant to 20 C.F.R. §718.305.

Finally, Judge Lawrence considered the physician opinion evidence under Section 718.202(a)(4). The Judge discredited Dr. Ravindranathan's finding of pneumoconiosis based on nodules seen on the x-ray, stating that the doctor did not understand the UICC classification system for x-rays, and it was not clear whether he saw radiographic evidence of pneumoconiosis or some other pulmonary or respiratory disease, or if the changes were of sufficient profusion to warrant a radiographic diagnosis of pneumoconiosis. Noting also Dr. Ravindranathan's finding that the pulmonary function studies showed no significant lung disease, Judge Lawrence concluded under all the facts that Dr. Ravindranathan's opinion was insufficient to establish the presence of pneumoconiosis.

After Judge Lawrence's denial of the initial claim in 1985, the miner submitted a new application for benefits, accompanied by a letter from Dr. Ravindranathan which stated: "To Whom It May Concern: Eugene Stone has coal workers' pneumoconiosis. It is advised that he be evaluated for Black Lung Benefits." The district director treated this second claim as a request for modification and denied the request, stating that "… the note from Dr. Ravindranathan's does not prove that you are now totally disabled by black lung disease and cannot be used as a basis for finding you to be eligible for benefits."

As previously discussed, the matter is before me for consideration of the request for modification of Judge Lawrence's denial of the claim for failure to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Because the issues were not fully addressed in my decision of July 1996, Claimant's motion for reconsideration is granted and my prior decision is modified as discussed herein. Under Section 725.310, the denial of black lung benefits can be reopened within one year upon a showing of a change in the miner's condition or a mistake in determination of fact. *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992) See also *Sahara Coal Co. v. Office of Workers' Compensation Programs (OWCP),* [McNew], 946 F. 2d 554, 556 (7th Cir. 1991). *20 C.F.R.§ 725.310*. A change in condition – a worsening of the applicant's black lung disease to the point where it is now totally disabling – entitles him to benefits from the date of the change. The correction of a mistake of fact, showing that he had totally disabling black lung disease at the time of the original hearing, entitles him to benefits from the date – which might be long before that hearing – on which he became totally disabled. *Eifler v. OWCP,* 926 F. 2d 663.

The evidence submitted since Judge Lawrence's decision in 1985 is summarized as follows:

X-Ray Reports[6]

Exhibit No.	Date of X-ray	Physician Qualifications	Interpretation
DX 27	3/5/87	Sloan, BCR	0/1
	3/5/87	illegible name	0/0
DX 9	9/6/90	Cole, B/BCR	0/0
DX 10	9/6/90	Sloan, BCR	1/1
DX 37	12/10/91	Fisher, B/BCR	1/1
DX 35	12/10/91	Renn, B	0/0
DX 37	12/10/91	Ahmed, B/BCR	1/1
DX 27	12/10/91	Stewart, B	0/0
DX 27	12/10/91	Castle, B	0/0
DX 27	12/10/91	Hippensteel, B	0/0
DX47	3/30/94	Bassali, BCR	1/2
DX 47	3/30/94	Mathur, B/BCR	1/2
DX 48	3/30/94	Binns, B	0/0
DX 48	3/30/94	Abramowitz, B	0/0
DX 48	3/30/94	Gogineni, B	0/0
EX 3	8/30/94	Selby, B	1/1

Pulmonary Function Studies

Exhibit No.	Date	Height[7] Age	Physician	FEV1	FVC	MVV	Qualifying
DX 18	4/2/85	69"/65	Ravin	2.20	2.82	71	
				2.17	3.56	77	No

Mild obstructive ventilatory dysfunction (bronchitis/emphysema)

[6] X--rays taken during the miner's various hospitalizations which were not classified under the regulatory criteria in Section 718.201 and which were not read for the presence or absence of pneumoconiosis, and are not included in my determination.

[7] The heights recorded on two of the six pulmonary function studies, the September 5, 1990 and August 30, 1994 studies differ from the heights reported on the other four pulmonary function studies. Given that two physicians who examined the miner after Dr. Sanjabi' recorded his height as 69", I find it highly probable that the height on Dr. Sanjabi's report was in error. Similarly, since the majority of the physicians who examined the miner found his height to be 69", and because Dr. Kahn who examined the miner just five months before Dr. Selby found the miner to be 69", I find the miner's height was 69" at all relevant times herein. *See Meyer v. Zeigler Coal*, 894 F. 2d 902, 13 BLR 2-285 (7th Cir. 19898*), cert. denied,* 498 U.S. 829 (1990)

Pulmonary Function Studies

Exhibit No.	Date	Height Age	Physician	FEV1	FVC	MVV	Qualifying
EX 22	3/5/87	69"/67	Sanjabi	2.17	3.56	89	No
DX 6	9/5/90	68"/71	Sanjabi	1.80	3.21	66	No
Moderate obstructive pattern							
DX 37[8]	12/10/91	69"/72	Houser	3.31 2.11*	4.32 3.39*	122 83.3*	Yes
Mild obstruction							
DX 37	3/30/94	69"/74	Kahn	1.40	2.01	46	Yes
FVC severely reduced; no significant expiratory obstruction; MVV severely reduced.							
EX 4	8/30/94	68"/74	Selby	1.68 1.01	1.08 2.00	31 31	Yes
Test was invalidated by Dr. Selby.							

Blood Gas Studies

Exhibit No.	Date	Physician	PcO2	pO2	Qualifying
DX 22	3/10/87	Sanjabi	100 85*	31 37*	No
DX 47	3/30/94[9]	Kahn	32	74.6	Yes

Medical Reports

In Marion Memorial Hospital admission records, Dr. R.M. Ravindranthan (Dr. Ravin) on September 17, 1983 indicated that the miner had a past history of coal workers' pneumoconiosis, chronic lung disease due to obstructive airflow disease and coal workers' pneumoconiosis. Later, in a statement, dated June 12, 1985, Dr. Ravindranthan stated: "To Whom It May Concern: Mr. Eugene Stone has coal miners (sic) pneumoconiosis. It is advised that he be evaluated for Black Lung Benefits." (DX 22)

[8] Dr. Long reviewed the ventilatory study and found it to be unacceptable because of less than optimal effort, and because the study was improperly performed.

[9] Dr. Kahn interpreted the results of the March 1994 blood gas as showing an impairment consistent with pulmonary emphysema and coal miner's pneumoconiosis.

The medical reports of Drs. Kahn, Kao, Selby, and the death certificate findings are summarized at pp. 7-9 of my prior decision and are incorporated herein. The physicians' opinions are briefly restated here for ease of reference. Dr. Kahn diagnosed pneumoconiosis and emphysema and found the miner to be totally disabled by the two conditions. Dr. Kao diagnosed chronic obstructive pulmonary disease and a pulmonary impairment due to significant coal dust exposure and cigarette smoking. Dr. Selby diagnosed pneumoconiosis based on x-ray and severe pulmonary disease due to cigarette smoking with possible minimal contribution from coal mine dust.

The record includes several medical reports by Dr. Sanjabi. His October 1981 report was considered by Judge Lawrence in his 1985 decision (DX 22), and is discussed *supra* at p. 5. More recently, on September 6, 1990, Dr. Sanjabi diagnosed chronic bronchitis by history, CAD by history, 0/1 coal workers' pneumoconiosis, with a limitation 2° to arterial cardiac disease and respiratory disease (COPD bronchitis) (DX 47).

Autopsy Reports

An autopsy was performed by Dr. C.P Katubig. Employer correctly notes that the report of Dr. Kabubig specifically states that "there was no evidence of pneumoconiosis." My summary of the physician's report at page 10 of my prior decision is modified to delete the statement that Dr. Katubig did not rule out the disease.

Dr. E. Crouch reviewed the autopsy slides, and Dr. Miles Jones reviewed the reports of Dr. Selby and Dr. Kahn, the autopsy report of Dr. Katubig, and the death certificate. The findings of Drs. Crouch, and Jones are summarized in my July 31, 1996 decision at page 9, and are incorporated herein. Dr. Crouch observed mild deposition of irregular coal dust particles and small numbers of birefringment particulates consistent with silicates. He found no coal dust macules, micronodules, or complicated leisions, and concluded there was no histologically discernible dust related lung disease. He concluded that the miner's occupational dust exposure could not have led to any functional impairment. Dr. Jones, based on his review of the medical reports of Dr. Selby and Kahn, and the autopsy slides and report, found anthracosis consistent with coal dust, and diagnosed coal workers pneumoconiosis, chronic obstructive/restrictive pulmonary disease. In his opinion, the miner's pulmonary function had been weakened by pneumoconiosis and his health was compromised by smoking and cardiovascular problems.

The record also includes the medical records from Marion Memorial Hospital, and St. Joseph's hospital in January 1991 for treatment of non-pulmonary related conditions.

Change in Condition

I initially found a change in the miner's condition based on Dr. Kahn's diagnosis of pneumoconiosis and his assessment that the miner was totally disabled by the disease. On reconsideration, my inquiry focuses on whether Dr. Ravindranthan's letter, which the miner submitted in support of his modification request following Judge Lawrence's denial of his claim, satisfied the minimum standard for reopening the claim articulated by the Court in *Amax Coal*

Co. v. Franklin, 957 F. 2d at 356.[10] The case at hand presents a situation very similar to that addressed by the Seventh Circuit in *Franklin*. The Court in *Franklin* found Claimant's physician's opinion insufficient to demonstrate a change in condition. I find the same to be true of Dr. Ravindranthan letter. Nothing In Dr. Ravin's letter indicated that the miner's physical condition had deteriorated since Judge Lawrence's denial. Absent such a showing, the miner was not entitled to have his claim reopened based on the change in condition.

Mistake in Fact

The United States Supreme Court, in *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971), has indicated that all evidence of record should be reviewed in determining whether "a mistake in a determination of fact" has made and stated that, under modification, the fact-finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See also Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993); *Kovac v. BCNR Mining Corp., 16 BLR 1-71, modifying 14 BLR 1-156; Director, OWCP v. Drummond Coal Co. (Cornelius)*, 831 F.2d 240 (11th Cir. 1987).

Notwithstanding whether the evidence submitted by the miner in this case may demonstrate a change in condition, the newly submitted positive x-ray reports, medical reports, and the qualifying pulmonary function studies establish a high probability of error on the issues of both pneumoconiosis and total disability. Therefore, the claim will be reopened, and an independent assessment of all the evidence will be made to determine whether the prior denial was based on a mistake in fact.

Pneumoconiosis

The x-ray evidence and the medical opinion evidence establish that the miner had pneumoconiosis prior to his death. Greater weight is accorded to the more recent x-ray interpretations as pneumoconiosis is a progressive irreversible disease. *Amax Coal Co. v. Franklin*, 957 F. 2d at 359. The August 30, 1994 chest x-ray was found to be positive by Dr. Selby, the only physician who read the film for the presence or absence of pneumoconiosis. The March 30, 1994 chest x-ray was also read positive by two physicians, Drs. Bassali and Mathur. Both of whom are dually certified as B-readers and board certified radiologists. Their opinions are accepted over the contrary opinions of the less qualified B-readers, Drs. Binns, Abramowitz, and Gogineni. *Zeigler Coal Co. v. OWCP*, 23 F. 3d 1235 (7th Cir. 1994);*Scheckler v. Clinchfield Coal Co*., 7 BLR 1-128 (1984). The December 10, 1991, chest x-ray was also read by the dually certified B-readers and board certified radiologists as positive, while three B-readers interpreted the film as negative. The more qualified physicians are credited over those of Drs. Renn, Stewart, Castle, and Hippensteel.

[10] The doctor's broad general statement is not supported by objective medical evidence and the rationale for his opinion is not stated. The statement merely reiterates his previously held opinion that the miner had pneumoconiosis, which was rejected by Judge Lawrence as unreasoned and undocumented.

Drs. Kahn, Kao, Selby and Jones, whose opinions are summarized at pp. 7-8 of my prior decision and incorporated herein, diagnosed pneumoconiosis, as that term is defined within the statute and regulations.[11] Each physician's opinion is accepted as well reasoned and documented.

Dr. Ravindanathan, the deceased miner's treating physician since 1980, was of the opinion that the miner had pneumoconiosis. While a treating physician's diagnosis may be accorded special consideration, in this instance Dr. Ravindanathan's most recent opinion is not accorded great probative weight, as it is not accompanied by supporting documentation, and he does not state the rationale for his diagnosis. *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992) (a treating physician's report which is not well-reasoned or well-documented should not be given greater weight); *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992). His earlier opinion is likewise rejected for similar reasons, as a stated by Judge Lawrence in his decision denying benefits. See pp. 5-6 *infra.*

Dr. Sanjabi also diagnosed pneumoconiosis in a report dated September 6, 1990, but his opinion is not credited. The doctor does not state how he arrived at his diagnosis of early coal workers' pneumoconiosis, category 0/1, and there is not x-ray which reveals pneumoconiosis, 0/1. Further more a reading of 0/1 under the regulatory criteria is a negative reading and not one positive for pneumoconiosis. Thus, I find his diagnosis of early coal workers' pneumoconiosis, category 0/1 is unreasoned and undocumented.

Dr. Katubig, the autopsy prosector, found no evidence of pneumoconiosis. Dr. Crouch found no discernible dust related lung disease based on his review of the autopsy slides. However, Dr. Jones, an equally pathologist reached a contrary opinion based on more complete information relating to the miner's medical condition. Dr. Jones not only reviewed the autopsy slides, but also considered the autopsy report and the reports of Drs. Selby and Kahn. I find his opinion to be more persuasive as it is better supported by the objective medical evidence of record than the opinion of either Dr. Katubig or Dr. Crouch, neither of whom had full knowledge of the miner's medical history.

Upon consideration of all the medical opinions, including the autopsy report, the pathologists' reports, and the physicians' reviews of the medical records, I find the weight of the medical opinions demonstrate that the miner did have pneumoconiosis.

Section 718.203 Causation

Section 718.203(b) provides further that, where as in the instant case, a miner was employed for ten years or more in the coal mines, there shall be a rebuttable presumption that pneumoconiosis arose out of such employment. I find that this presumption has not been rebutted here. Dr. Kao, Kahn, Selby, and Jones found the miner's pneumoconiosis to be related to coal dust exposure. Since Drs. Katubig and Crouch did not diagnose pneumoconiosis, their opinions

[11] *Freeman United Coal Co. v. Office of Workers' Compensation Programs*, 957 F. 2d 304 (7th 1992) (pneumoconiosis defined as any lung disease caused in whole or part by exposure to coal dust.). Dr. Jones' diagnosis of anthracosis consistent with coal dust and containing small birefrigent crystals consistent with silicates satisfies the definition of pneumoconiosis at 20 C.F.R. § 717.201(a)(1)

are not relevant to consideration of the cause of the miner's pneumoconiosis. (citation) In conclusion, since none of the physicians who diagnosed pneumoconiosis attributed it to a cause other than coal mine employment. Claimant has met her burden of proof under subsection 710.203.

Section 718.395 Presumption of Pneumoconiosis

Because Mr. Stone filed his claim prior to January 1, 1982, the presumption at Section 718.305(a) applies. Section 718.305 creates a rebuttable presumption of pneumoconiosis if Claimant can demonstrate that (1) the miner worked in underground or comparable surface mines for fifteen years; (2) his x-ray evidence did snot show complicated pneumoconiosis; and (3) he had a totally disabling respiratory or pulmonary impairment. *Peabody Coal Co. v. Spese*, 117 F. 3d 1001, 10010 (7th Cir. 1997); *Blakely v. Amax Coal Co*., 54 F. 3d 1313 (7th Cir. 1995).. When the presumption is invoked the miner is entitled to benefits unless the coal company overcomes the presumption with rebuttable evidence. Employer can rebut the presumption by proof that the miner did not have pneumoconiosis or that his impairment did not arise out of his coal mining employment.

Claimant must establish that Mr. Stone worked for fifteen years in an underground mine or in a surface mine with dust conditions substantially similar to those found in underground mines. *Director v. Midland Coal,* 855 F. 2d 509, 511 (7th Cir. 1988) (miner had combination of underground and surface mining, and was exposed to sufficient coal dust in his surface mining employment). Neither party challenges Judge Lawrence's finding that the miner was employed as a coal miner for 37 years, and that finding is incorporated herein. ((DX 22, Tr. 2, DX 52) The evidence supports a finding that the miner was regularly employed in and around a coal mine or coal mine preparation facility throughout his 37 years of employment with Zeigler Coal Co. at its Mine # 4.

The miner's testimony during his deposition indicates that he was employed both underground and above ground on the mine site of #4 Zeigler until the mine closed down. He was first employed as a laborer above ground, and then worked underground for two years as a repairman. He worked the dozer, drag line, and the crane for 20 years above ground at the mine site starting in the 1950's, pushing gob floors out. From about 1973 to 1980, he then worked as hoisting engineer for about six or seven years. When the mine shut down, in 1980, he went back into the slurry as dozer operator where the coal was fine and there was a lot of dust. Mr. Stone last worked as a miner in 1981.[12] Mr. Stone's work would have resulted in sufficient dust

[12] Official notice is taken of the Illinois Administrative Code, (the implement regulations for the Surface Mined Conservation and Reclamation Act of 19971) which defines "gob" in the coal mining process as refuse from coal preparation and cleaning , consisting of waste coal, slate, or other unmarketable material of relatively large size which is separated from the marketable coal in the cleaning process. *See 62 ILAC300.*

"Slurry" is that portion of refuse separated from the coal in the cleaning process, consisting of fines and clays in the preparation of plant effluent, and which is readily pumpable*. 62 ILAC 300.(2002).* After the coal is washed and put through the crusher, refuse typically consists of liquid mixture of water and finely crushed coal and rock, referred to as fine coal refuse and slurry. The coarse coal refuse (gob) is used to construct impoundment structures to store the slurry. Mr. Stone's work above ground apparently involved movement of the coarse coal waste. While the record is not entirely clear, it appears that his work was related to the construction of impounds for the storage of the slurry. Mr. Stone's undisputed testimony was that he moved millions of tons of "gob" during his employment as a dozer

exposure to invoke the presumption. *See Freeman United Coal Mining Co. v. Summers,* 272 F. 3d 473 (7th 2001)

None of Mr. Stone's x-rays show complicated pneumoconiosis. Thus, Claimant must introduce other evidence demonstrating a totally disabling respiratory of pulmonary impairment. A totally disabling respiratory impairment may be established by the methods set forth in Section 718.204(c).[13].

Section 718.204(c)(1) provides that pulmonary function tests may establish a totally disabling respiratory impairment, if the values are equal to or less than those listed in Appendix B to the Part 718 regulations for the FEV_1 test, and for either the FVC or MVV test, or if the FEV_1/FVC ratio is equal to or less than 55 percent. The earlier pulmonary function studies dated September 24, 1981, August 7, 1984 and March 5, 1987 (DX 22) do not satisfy the regulatory criteria for disability. For a miner 69" in height, the values produced on the September 5, 1990 and the March 30, 1994 studies demonstrate total disability under the regulatory criteria. The December 10, 1991 study was invalidated. [14] Inasmuch as studies conducted before and after that invalid test were qualifying, I find that the Claimant has demonstrated total disability under subsection (c)(1) by the most recent valid studies taken in 1990 and 1994.

A totally disabling respiratory impairment may also be established by qualifying blood gas studies under Section 718.204(c)(2). In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. Neither the earlier 1981 blood gas study, nor the most recent one taken in 1994 produce qualifying values. Therefore, Claimant cannot demonstrate that the miner was totally disabled under subsection (c)(2).

Since there is no evidence that the miner had *cor pulmonale* with right sided congestive heart failure, claimant cannot establish a totally disabling impairment under subsection (c)(3).

The Claimant may also establish total disability, based on medically acceptable clinical and laboratory diagnostic techniques, through a reasoned medical opinion that the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. § 718.204(c)(4). With the exception of Dr. Crouch and Dr. Jones, every physician who examined the miner and/or reviewed his medical

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operator.

[13] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 945-80, 197 (2000), codified at 20 C.F.R.,Parts 718, 722, 725 and 726. Since this claim was filed prior to January 19, 2001**,** portions of the amended regulations may not apply.

[14] The December 1991 study administered by Dr. Houser, produced qualifying results prior to bronchodilation, but non qualifying results post bronchodilation (DX 37) Since an impairment due to pneumoconiosis does not improve after the administration of a bronchodilator, I reiterate my conclusion that the results of this test would be insufficient evidence of total disability. Further, as I noted in my prior decision, the administering physician noted poor effort during the test on the part of Mr. Stone, and an independent reviewing physician found the test to be unacceptable due to poor effort and improper performance (DX 41) Accordingly, I accord less weight to this study. See *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141 (1984); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984).

records concluded that he was totally disabled by his pulmonary disease which included pulmonary emphysema, chronic obstructive/restrictive pulmonary disease, and coal workers pneumoconiosis. Dr. Kahn found the miner to be totally disabled due to pneumoconiosis and emphysema, and that his coronary problems were contributing factors. His opinion is based, in part, on abnormal blood gases and a pulmonary function study which was moderately abnormal and suggestive of restrictive disease consistent with coal workers' pneumoconiosis and pulmonary emphysema. Dr. Kao diagnosed chronic obstructive lung disease and a pulmonary impairment due to significant coal dust exposure and cigarette smoking. He opined that the miner's pulmonary impairment would prevent him from performing his regular employment. Dr. Jones was also of the opinion that the miner was significantly disabled, based on pulmonary function studies which showed decreased pulmonary reserve. Dr. Selby also diagnosed total disability caused by respiratory and cardiac conditions. His opinion that the miner's disability was not related to his coal mine employment is relevant on rebuttal of the presumption under 718.305, but does not defeat the invocation of the presumption.

Dr. Sanjabi did not make a finding of total disability in 1981 or 1987, but did find him to be disabled due to his pulmonary condition in 1991. (DX 7) Dr. Sanjabi's most recent opinion is not fully credited since it was reached based on an invalid pulmonary function study. De. Ravin's earlier disability assessment is rejected for the same reasons indicated b Judge Lawrence at pp. 5-6 infra.

Dr. Crouch was the only physician who evaluated the miner's pulmonary condition who expressed an opinion that the miner did not have a functional impairment. Dr. Crouch's opinion is not accepted, given the record evidence of qualifying pulmonary function studies, and the weight of the physician opinions who reached contrary conclusions. *Peabody Coal v. Shank*, 906 F 2d 271 (7th Cir 1990).

As noted in my prior decision, Dr. Jones' opinion, standing alone, does not conclusively establish the degree of the miner's pulmonary impairments. Nonetheless, his finding of "significant pulmonary function deficits" and resultant disability related at lest in part to coal workers' pneumoconiosis is consistent with, and lends weight to, the opinions of those physicians who made affirmative unequivocal assessments of total disability.

Dr. Katubig did not offer a disability assessment. Considering all the physician opinions, I find the preponderance of the evidence establishes that the miner did have a totally disabling pulmonary or respiratory impairment under subsection (c)(4).

Because Claimant has established total disability presumptively caused by pneumoconiosis, I turn to whether the Employer rebutted the presumption. To rebut the presumption, Zeigler Coal must show that the miner did not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of his coal mine employment. However as discussed above, the Claimant has established that the miner had pneumoconiosis by x-ray evidence, physician reports, and the pathologist report of Dr. Jones.

Thus, to rebut the presumption, Zeigler must show by a preponderance of the evidence that coal mine employment was not a contributing cause to Mr. Stone's disabling pulmonary

impairment. The Seventh Circuit has read the "contributing cause" language to mean that mining must be a necessary, but need not be a sufficient condition of the miner's disability. *Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994); *Compton v. Inland Steel Coal Co.,* 933 F 2d 477, 480-81 (7th Cir. 1991), *Shelton v. Director, OWCP*, 899 F. 2d 690, 693 (7th Cir. 1990). *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 1-17 (7th Cir. 1990). Under the "necessary condition" standard, a physician's opinion which can be read as showing that the miner's total disability is due in part to pneumoconiosis is sufficient to satisfy the burden of proof under section 718.204(b) The miner is not required to prove that pneumoconiosis was a "significant or substantial" contributing factor. *Compton v. Inland Steel Co*., 933 F 2d 477, 15 BLR 2-79 (7th Cir. 1991). If the Employer establishes that Mr. Stone would have been disabled regardless of the exposure to coal dust, then the coal dust will not be found to be a contributing factor to his disability

Although the evidence indicates that the miner had heart problems, emphysema, and lung cancer, it also shows that his disability was in part due to coal dust related respiratory impairment. For the reasons discussed above, Dr. Crouch's opinion that the miner did not have a functional impairment is not given great weight. Dr. Selby's opinion is not persuasive, inasmuch as he fails to address the positive x-ray findings of Category 2/1 perfusion, all zones, or why he placed more significance on the miner's smoking history (25 pack years) and discounted his significant coal mine employment history of 37 years. Moreover, I find his opinion to be outweighed by the preponderance of the physician opinions who held contrary opinions. Mr. Stone's treating physicians for both his coronary disease and lung cancer (Drs. Kao and Kahn) found a disabling chronic obstructive pulmonary impairment due to coal dust and smoking. Dr. Jones also found the miner's coal workers' pneumoconiosis a significant factor in his pulmonary impairment. For the foregoing reasons, I find Employer has failed to rebut the presumption by showing that the miner would have been disabled regardless of his 37 years of exposure to coal mine dust.

Onset Date of the Miner's Disability

Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis. When the evidence does not establish a date of onset, 20 C.F.R. 725.503 applies. That section provides that "[w]"here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." *20 C.F.R. § 725.503(b*).[15] The coal company can refute that date by credible evidence that the miner was not disabled on the date of filing. *See Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F 2d 600, 603-604 (3d Cir. 1989).

I have found that the later x-ray evidence establishes that the miner did have pneumoconiosis prior to his death. Recognizing that pneumoconiosis is a progressive irreversible disease, the dates on which the first positive evidence of pneumoconiosis appeared on x-rays is not determinative of when the miner actually contracted the disease. However, x-ray evidence is probative only to the existence of pneumoconiosis and not to the extent of disability, and is insufficient to prove onset of disability. The earliest date of credible evidence of total disability is

[15] In the case of a miner who filed a claim before January 1, 1982 benefits are payable to the miner's eligible survivor beginning with the month within which the miner died. (20 C.F.R. 725.503(b)

the date of the qualifying pulmonary function study on December 10,1991. The two pulmonary function tests administered in March 5, 1987 and September 5, 1990 were non qualifying, indicating that the miner was not totally disabled. While the default date for onset of total disability due to pneumoconiosis under the regulations is the date of filing of the claim, the miner cannot be found to be totally disabled during a period when the evidence shows that he was not totally disabled. As the objective medical evidence documents that the miner was not totally disabled on December 5, 1990, I find that the date of onset of disability to be December 6, 1990. I reach this conclusion cognizant of the fact that the date of the subsequent pulmonary function in 1991, which produced values which satisfy the disability criteria under the regulatory standards, simply indicates that the miner became totally disabled at some point after the last non-qualifying pulmonary function test in 1990.

In conclusion, I find that Claimant has demonstrated that the prior denial was based on a mistake in determination of fact, and that she has established by a preponderance of the evidence that Mr. Stone was totally disabled due, in part, to coal workers' pneumoconiosis. I further find the date of onset of the miner's total disability due to pneumoconiosis was September 6, 1990, as discussed above.

Attorney's Fee

An application by Claimant's attorney for approval of a fee has not been received and, therefore, no award of fees for services is made. Thirty days is hereby allowed to Claimant's representative for the submission of such an application and attention is directed to Sections 725.365 and 725.366 of the regulations. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. Parties have twenty days following the receipt of any such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

The Employer, Zeigler Coal Company, is hereby ordered to pay to the estate of Eugene Stone, all benefits to which he would have been entitled under the Act, commencing on September 6, 1990, augmented for his dependent wife Vivian Stone.

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MOLLIE W. NEAL
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from

the date of this Decision and Order by filing a notice of appeal with the Benefits Review Board, AT Post Office Box 37601, Washington, D.C. 20013-7601. A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.
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